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Immigration Policy: A Look at Its History and Its Future

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Immigration Policy: A Look at Its History and Its Future

By Melisa Fumbarg*

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I. INTRODUCTION

Illegal, criminal, nuisance, job stealer, uneducated, un-American, second-class citizen. Imagine living your life and having to constantly hear insults spoken about you. You were somehow, maybe by no fault of your own, categorized with roughly eleven million other people.¹ Eleven million people with different characteristics and journeys² are all placed under the same stereotype, but even worse, they are not only judged for their differences, they are criminalized for it.

Now, imagine not having a voice to stand up for yourself. You work hard, do what you can to make a living, try to live a respectable life, are patriotic, and hope your neighbors recognize this. However, some of your neighbors do not, but you have no voice to tell them to look at your accomplishments and to see you differently; you are powerless.³

* Melisa Fumbarg, J.D., Pepperdine University School of Law, 2019; B.A. in journalism and minor in history, *summa cum laude*, California State University Northridge, 2015. The author would like to thank her family for all of their love and support and for always instilling the importance of education, open-mindedness, compassion, and appreciation for the beauty in diversity.

¹ Jeffrey S. Passel & D'Vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, PEW RES. CTR. (Sept. 20, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/7/2016/09/31170303/PH_2016.09.20_Unauthorized_FINAL.pdf.

² Although 78% of undocumented immigrants come from North America and Central America, there are 1.3 million people who originate from Asia and 0.7 million people from South America. Within these regions, there are multiple countries. Thus, the 11 million undocumented immigrants have unique backgrounds and cultures that cannot be categorically seen as one. Bryan Baker & Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*, DEP'T OF HOMELAND SEC.: OFF. OF IMMIGR. STATS. (Mar. 2013), https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

³ Being undocumented, especially for children and young adults, can be a difficult experience because of their "isolation from peers, the struggle to pursue an education, fears of detention and deportation, and the trauma of separation from family and loved ones." *Undocumented Americans*, AM. PSYCHOLOGICAL ASS'N, <http://www.apa.org/topics/immigration/undocumented-video.aspx> (last visited Apr. 8, 2019). This can leave these individuals feeling powerless. *Id.* Moreover, undocumented individuals cannot vote and, thus, cannot fully participate in civic

Most people have probably heard of undocumented individuals being referred to as some of the above terms.⁴

Yet, these are not just empty words.⁵ Unfortunately, society treats undocumented individuals as second-class citizens.⁶ These people are missing a piece of paper that makes them “American,” and that is the single most important factor getting in the way of their “American dream” for life, liberty, and the pursuit of happiness.

Like anything in life, or at least anything political, no argument comes without a counter-argument. There are people who will argue that undocumented individuals have deliberately broken the law and are not simply missing a piece of paper which could imply some sort of “administrative mistake.”⁷ Within this group of people, some are more accepting of undocumented children and adults who arrived in

service. Furthermore, by not casting a vote, undocumented individuals cannot elect officials who will represent their best interests.

⁴ Fox News Latino issued a poll that found that 46% of Latino voters find the term “illegal immigrant” offensive and only one-third found the term “accurate.” Gene Demby, *In Immigration Debate, 'Undocumented' Vs. 'Illegal' Is More Than Just Semantics*, NAT’L PUB. RADIO (Jan. 30, 2013), <https://www.npr.org/sections/itsallpolitics/2013/01/30/170677880/in-immigration-debate-undocumented-vs-illegal-is-more-than-just-semantics>. Furthermore, the terminology distinction between “undocumented,” “unauthorized,” “illegal,” “alien,” and some other terms, not only have social connotations but also have political ones. *Id.* Thus, while there is no official “correct” way of saying the same thing, word choice can matter a great deal. *Id.*

⁵ Studies show that individuals can have negative consequences as a result of stereotypes. *Exploring the Negative Consequences of Stereotypes*, UNIV. OF ARIZ. NEWS (Nov. 20, 2003), <https://uanews.arizona.edu/story/exploring-negative-consequences-stereotyping>. Moreover, when it comes to stereotypes about undocumented individuals whom are predominately Latino, the consequences are not just individualized but have a deeper significance in the American public that affects social and political constructs. Tyler Reny & Sylvia Manzano, *The Negative Effects of Mass Media Stereotypes of Latinos and Immigrants*, Vandenhoeck & Ruprecht Verlage, 195, 196 (July 6, 2016), http://tylerreny.github.io/pdf/pubs/reny_manzano_stereotypes_2016.pdf.

⁶ Sarah Macaraeg, *We Live as Second-Class Citizens’: What It’s Like to Face Border Agents Everyday*, THE GUARDIAN, May 3, 2018, <https://www.theguardian.com/us-news/2018/may/03/border-patrol-agents-second-class-citizens>.

⁷ Demby, *supra* note 4.

the country as children.⁸ However, there are others who are not so forgiving.⁹ Within each side of the aisle, there are countless mindsets, arguments, and solutions. Since there is yet to be a concrete solution, lawmakers continue to debate immigration policy.

This comment will examine immigration in the United States, specifically by addressing questions involving the constitutionality of Deferred Action for Childhood Arrivals (DACA) and removal procedures. Part II will look at the historical background of immigration policy in the United States, including past amnesties and the latest reform, DACA.¹⁰ Part III will analyze DACA and why it was rescinded.¹¹ Part IV will discuss one the most detrimental consequences of DACA being rescinded—deportation, and the constitutional limits of removal procedures.¹² Part V will deploy some future predictions on immigration and the next steps Congress should take to ensure that there is effective reform.¹³ Part VI will conclude the comment with a brief overall view on immigration, DACA, and deportation proceedings.¹⁴

⁸ A recent poll shows that 70% of Americans support DREAMers staying in the country. Anthony Salvanto, Jennifer De Pinto, Kabir Khanna & Fred Backus, “*Nation Tracker: Americans Weigh in on Trump Immigration Remarks, First Year in Office*,” (Jan. 14, 2018), <https://www.cbsnews.com/news/nation-tracker-americans-weigh-in-on-trump-immigration-remarks-first-year-in-office/>.

⁹ *Id.* While, 70% of Americans supporting DREAMers is the majority, 30% are opposed to DACA and even more are opposed to other forms of immigration reform. *Id.* For example, “65% of voters overall agreed with Trump’s position that any bill codifying Obama-era protections for illegal immigrants brought to the U.S. as children should be accompanied by funding for a wall, ending chain migration, and ending the diversity visa lottery program.” Saagar Enjeti, White House Correspondent, *Poll: Majority Of Americans Agree With Trump On DACA Immigration*, DAILY CALLER (Jan. 22, 2018), <https://dailycaller.com/2018/01/22/poll-majority-of-americans-agree-with-trump-on-daca-immigration/>.

¹⁰ See *infra* notes 15–62 and accompanying text.

¹¹ See *infra* notes 63–240 and accompanying text.

¹² See *infra* notes 241–309 and accompanying text.

¹³ See *infra* notes 310–22 and accompanying text.

¹⁴ See *infra* notes 323–30 and accompanying text.

II. HISTORICAL BACKGROUND

It was not customary in early American history to question immigration policies.¹⁵ That changed in the late 1800s, when immigration increased, and the nation's economy took a downfall.¹⁶ Following the Civil War, several states enacted immigration policies.¹⁷ It was not until 1875 that the Supreme Court in *Henderson v. Mayor of New York*¹⁸ held that immigration was a federal responsibility and changed the scope from the states to the federal government, which is the system in place today.¹⁹

Some of the first immigration policies in the nation included the Chinese Exclusion Act of 1882 and the Alien Contract Labor Laws of 1885 and 1887.²⁰ These laws barred various laborers from migrating to the United States.²¹ Another immigration policy in the same time period was The General Immigration Act of 1882, which was designed to profit from immigration by creating a fifty cent tax on each immigrant.²² At the same time, this law made the immigration process more selective by preventing entrance to “idiots,

¹⁵ *Early American Immigration Policies*, U.S. CITIZENSHIP IMMIGR. SERVS. (2012), <https://www.uscis.gov/history-and-genealogy/our-history/agency-history/early-american-immigration-policies> (last updated Sept. 4, 2015).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Henderson v. Mayor of New York*, 92 U.S. 259 (1875). *See* Jennifer Chacon, *Who is Responsible for U.S. immigration policy?*, AM. BAR ASS'N (“Article I, Section 8, clause 4 of the Constitution entrusts the federal legislative branch with the power to ‘establish a uniform Rule of Naturalization.’ This clear textual command for uniformity establishes that the federal government, specifically Congress, is responsible for crafting the laws that determine how and when noncitizens can become naturalized citizens of the United States.”). Moreover, on the federal level there is also the Department of Homeland Security, which is under the Executive Branch purview. However, “the policies and practices of state and local governments throughout the country continue to shape the lived experience of the immigrants within their jurisdiction. Notwithstanding the letter of the law, federal immigration law is always mediated by powerful intervening forces at the state and local level.” *Id.*

¹⁹ *Early American Immigration Policies*, *supra* note 15.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

lunatics, convicts, and persons likely to become a public charge.”²³ Ultimately, the federal government opened the well-known Ellis Island immigration service in 1892.²⁴

There was another mass immigration wave between 1900 and 1920 during World War I, in which approximately 24 million people came to the country.²⁵ As a response, the national-origins quota system enactment of 1921 and revision of 1924 called for limited immigration by “assigning each nationality a quota based on its representation in past U.S. census figures.”²⁶ In 1924, Congress also established the U.S. Border Patrol as part of the Immigration Service.²⁷

During the “post-war years,” Congress enacted several other immigration policies. In 1951, the United States and Mexico created an official accord—the Mexican Agricultural Labor Program (MALP), also known as the “Bracero Program.”²⁸ This program coordinated hundreds of thousands of agricultural workers from Mexico to work with American employers as “non-immigrant laborers.”²⁹ In the late 20th Century, the United States went through many more changes in its immigration policies.³⁰

²³ *Id.*

²⁴ *Origins of the Federal Immigration Service*, U.S. CITIZENSHIP & IMMIGR. SERVS. (2012), <https://www.uscis.gov/history-and-genealogy/our-history/agency-history/origins-federal-immigration-service> (last updated Feb. 4, 2016). See The Statute of Liberty—Ellis Island Foundation, Inc., <https://www.libertyellisfoundation.org/about-the-ellis-island>. More than 12 million immigrants arrived in the U.S. from Ellis Island between 1892 and 1954. Moreover, it is believed that around “half of all Americans today can trace their family history to at least one person who passed through the Port of New York at Ellis Island.” While most immigrants did enter through Ellis Island, other ports of entry included Boston, Philadelphia, Baltimore, San Francisco, Savannah, Miami, and New Orleans.

²⁵ *Historical Overview of Immigration Policy*, CTR. FOR IMMIGR. STUDIES, <https://cis.org/Historical-Overview-Immigration-Policy> (last visited Feb. 17, 2018).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Post-War Years*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/history-and-genealogy/our-history/agency-history/post-war-years> (last updated Feb. 4, 2016).

²⁹ *Id.*

³⁰ *Id.*

In 1986, “Congress passed the Immigration Reform and Control Act (IRCA). This legislation has two major facets: amnesty and enforcement.”³¹ The IRCA allowed amnesty for undocumented individuals if they satisfied one of two conditions: “they had resided continually in the U.S. since January 1982 or they had completed 90 days of agricultural work between May 1985 and May 1986.”³² About 94% of the amnesty applicants received approval, which gave legal status to an estimated three million people.³³

The 1990 Immigration Act amplified obtainable visas by 40%.³⁴ The Act “retained family reunification as the major entry path, while more than doubling employment-related immigration.”³⁵ Furthermore, “the law also provided for the admission of immigrants from ‘underrepresented’ countries to increase the diversity of the immigrant flow by creating a lottery system.”³⁶

During the 1990s and early 2000s, Congress passed another four amnesties.³⁷ The first, Section 245(i) of 1994, pardoned approximately 578,000 people in exchange for a \$1,000 fine.³⁸ The second was the Nicaraguan Adjustment and Central American Relief Act (NACARA), passed in 1997, which gave an estimated one million Central Americans legal status.³⁹ The third, the Haitian Refugee Immigration and Fairness Act (HRIFA) of 1998 included Haitians because they had previously been excluded from

³¹ *Historical Overview of Immigration Policy*, *supra* note 25.

³² *Id.*

³³ *Id.* After more than a decade, in 2000, the IRCA program allowed those who were originally denied reapplying for a chance of obtaining legal status. *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* This was the beginning to the now controversial Diversity Immigrant Visa Program which was created to increase immigration from a variety of countries as well as give those without connections to the U.S. more opportunities to migrate. The cap for selecting lottery “winners” went from 55,000 people per year to 50,000 per year more recently. However, with more than 13 million applicants, the chances of being selected are minimal. *The Diversity Immigrant Visa Program: An Overview*, AM. IMMIGR. COUNCIL (Nov. 13, 2017), <https://www.americanimmigrationcouncil.org/research/diversity-immigrant-visa-program-overview>.

³⁷ *Historical Overview of Immigration Policy*, *supra* note 25

³⁸ *Id.* This amnesty was later renewed in 1997 and again in 2000. *Id.*

³⁹ *Id.*

NACARA.⁴⁰ Lastly, in 2000, the Legal Immigration Family Equity Act (LIFE) passed for individuals waiting to become green card holders who were unable to be processed due to large volumes of applications.⁴¹

Following September 11, 2001, immigration became more serious and the government sought to fix problems with the system.⁴² The Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005 enacted by the House created greater protection both domestically and on the border.⁴³ The Comprehensive Immigration Reform Act of 2006 (CIRA) provided an amnesty for undocumented individuals in the country while also pushing for legal immigration.⁴⁴ However, no compromise bill ever became law.⁴⁵ The Senate again tried to pass CIRA of 2007 to try to accomplish the same thing.⁴⁶ Although the bill received bipartisan support in the Senate, it “was widely unpopular with the American public . . . essentially killing it.”⁴⁷

In 2001, the bipartisan Development, Relief, and Education for Alien Minors Act (DREAM Act) attempted to “provide[] legal status and eventually a path to citizenship for undocumented youth who entered the United States as adolescents, stayed in the country unlawfully to finish high school, had good moral character, and remained in the United States to pursue higher education or military service.”⁴⁸ However, despite the bipartisan support of the DREAM Act, it failed to pass and become law.⁴⁹ The DREAM Act had similar content to that of the majority opinion in *Plyler v. Doe*, which held that the States could not refuse to give public education to

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Olga Y. Kuchins, *NOTE: Out of the Shadows: Deferred Action for Childhood Arrivals, Deferred Action to Parents of Americans and Lawful Permanent Residents, and Executive Prosecutorial Discretion in Immigration Law*, 43 HASTINGS CONST. L.Q. 705, 708–09 (2016).

⁴⁹ *Id.*

children who failed to prove their lawful presence in the country because, in essence, it would penalize children for their parents' decisions.⁵⁰

In the following decade, the DREAM Act came close to passing, but even tougher conditions did not persuade Congress to pass it.⁵¹ As a result, "the stalled DREAM Act left the problem of undocumented youth and the burdened United States immigration system unaddressed."⁵² President Obama's frustration over the defeat of the DREAM Act resulted in the following statement:

In an incredibly disappointing vote today, a minority of Senators prevented the Senate from doing what most Americans understand is best for the country. As I said last week, when the House passed the DREAM Act, it is not only the right thing to do for talented young people who seek to serve a country they know as their own, it is the right thing for the United States of America. Our nation is enriched by their talents and would benefit from the success of their efforts. The DREAM Act is important to our economic competitiveness, military readiness, and law enforcement efforts.⁵³

Thereafter, in 2012, President Obama announced the DACA program to allow "DREAMers" to be in the United States without the fear of deportation and to work legally.⁵⁴

After a few years, President Obama tried to expand DACA even more by eliminating some of the restriction to DACA as well as establishing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), a similar policy for undocumented parents of U.S. citizens and lawful permanent

⁵⁰ 457 U.S. 202, 205, 230 (1982).

⁵¹ Kuchins, *supra* note 48, at 708–09.

⁵² *Id.* at 709.

⁵³ *Id.*

⁵⁴ *Id.*

residents.⁵⁵ Jeh Charles Johnson, Secretary of Homeland Security, issued the “DAPA Memo” on November 20, 2014 outlining the terms of the DACA expansion and DAPA.⁵⁶ As for DACA, the memo outlined an age gap removal so that anyone who entered the country prior to the age of sixteen could be eligible regardless of their age when applying as well as changing the date-of-entry.⁵⁷ Furthermore, DACA would last three years instead of two.⁵⁸ As for DAPA, the memo outlined that a process similar to that of DACA could apply to parents of U.S. citizens and lawful permanent residents who continuously resided in the country since January 1, 2010, among some other requirements.⁵⁹ However, DACA’s expansion and DAPA encountered adverse treatment from the public and certain state leaders.⁶⁰ Eventually, the program’s legal merits did not meet the scrutiny of the Court in a deadlocked decision in *Texas v. United States* and DAPA never became law.⁶¹

A few years later, President Trump announced the rescission of DACA with the following statement:

Officials from 10 States are suing over the program, requiring my Administration to make a decision regarding its legality. The Attorney General of the United States, the Attorneys General of many states, and virtually all other top legal experts have advised that the program is unlawful and unconstitutional and

⁵⁵ Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, DEP’T OF HOMELAND SEC. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Defending DAPA and Expanded DACA Before the Supreme Court*, AM. IMMIGR. COUNCIL (Apr. 11, 2016), <https://www.americanimmigrationcouncil.org/research/defending-dapa-and-expanded-daca-supreme-court>.

⁶¹ *Texas v. United States*, 86 F. Supp. 3d 591, 606 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *cert. granted*, 136 S. Ct. 906, 193 L. Ed. 2d 788 (2016).

cannot be successfully defended in court. There can be no path to principled immigration reform if the executive branch is able to rewrite or nullify federal laws at will.⁶²

What about DACA made it “unconstitutional?” That question, as well as questions regarding what will happen now that DACA is revoked, with regard to economic repercussions, employment, identification, and deportation, will be discussed in the following sections.

III. DEFERRED ACTION FOR CHILDHOOD ARRIVALS

A. DACA's Components

DACA is technically known as an executive memorandum.⁶³ Janet Napolitano, Secretary of Homeland Security under President Obama, issued it on June 15, 2012.⁶⁴ Though it is a memorandum, it acts in the same way as an executive order.⁶⁵ The memorandum laid out the components of prosecutorial discretion observed by the

⁶² Statement from President Donald J. Trump (Sept. 5, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-7/>.

⁶³ Julie Percha, *Your Cheat Sheet for Executive Orders, Memorandums, and Proclamations*, PBS, Jan. 27, 2017, <https://www.pbs.org/newshour/politics/cheat-sheet-executive-orders-memorandums-proclamations>.

⁶⁴ Janet Napolitano, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012) [hereinafter Napolitano Memorandum], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁶⁵ Percha, *supra* note 63. There are slight differences between “executive action,” “executive order,” and “executive memorandums and proclamation.” *Id.* An executive action encompasses any action by the president. *Id.* An executive order is “an official, legally binding mandate passed down from the president to federal agencies...Executive orders are printed in the Federal Register, and they’re numbered consecutively for the sake of keeping them straight.” *Id.* An executive memorandum is very similar except for the fact that they do not have to be printed in the Federal Register. *Id.*

Executive Branch in its protection of “certain young people” who entered the country unlawfully.⁶⁶

In DACA, President Obama called for prosecutorial discretion in deferring removal of specified young people who met the requirements of the program.⁶⁷ The requirements included: (1) having arrived in the United States under the age of sixteen; (2) having lived continuously in the United States for at least five years; (3) being a high school student, high school graduate, student with general education development certificate, or honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (4) not having felony convictions; (5) not having significant misdemeanor offenses or multiple misdemeanor offenses, or posing a threat to national security or public safety; and (6) being under the age of thirty-one.⁶⁸

Furthermore, individuals who requested deferred action had to first pass a background check and requests were decided on a case-by-case basis.⁶⁹ DACA applied to individuals even if they were in removal proceedings.⁷⁰ The memorandum also briefly stated that once individuals received deferred action status, they could apply to obtain work authorization in order to work during this period.⁷¹ Thus, part of the program was that DACA recipients received deferred action status and work authorization in two-year intervals, subject to renewal after those two years.⁷²

Moreover, part of the program meant that once the USCIS granted individuals their deferred action status and work authorization, these individuals could be eligible to receive social security numbers from the Social Security Administration.⁷³ As a result, these individuals could also receive certain benefits that were

⁶⁶ Napolitano Memorandum, *supra* note 64. *See infra* notes 261–67 and accompanying text.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Social Security Number and Card—Deferred Action For Childhood Arrivals*, SOC. SEC. ADMIN. (Feb. 17, 2018), https://www.ssa.gov/pubs/deferred_action.pdf.

not previously extended to undocumented individuals, such as Medicare.⁷⁴ However, DACA recipients were not eligible for federal welfare or federal student aid.⁷⁵

The motives behind DACA were explained in the memorandum as the following:

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.⁷⁶

By issuing DACA and releasing this statement, the Obama Administration demonstrated its support of undocumented young people and showed that if Congress failed to act, the President would.⁷⁷ However, the memorandum made clear that DACA had its limitations:

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.⁷⁸

⁷⁴ Telephone interview with Barry P. McDonald, J.D., Professor of Law at Pepperdine Univ. School of Law, a recognized expert in constitutional law (Oct. 11, 2017).

⁷⁵ *Torres v. U.S. Dep't of Homeland Sec.*, No. 17cv1840 JM(NLS), 2017 U.S. Dist. LEXIS 161406, at *3–4 (S.D. Cal. Sep. 29, 2017).

⁷⁶ Napolitano Memorandum, *supra* note 64.

⁷⁷ *Id.*

⁷⁸ *Id.*

B. DACA's Constitutionality Debate

President Trump rescinded DACA because of its alleged unconstitutionality.⁷⁹ The debate stems from the executive making decisions that are in Congress' power.⁸⁰ Although other presidents have issued executive orders throughout history, the issue lies with the various components of DACA.⁸¹ DACA's components should be analyzed separately to determine which, if any, are in fact unconstitutional.⁸² Moreover, even if the President does not have a direct power from the Constitution, the President enjoys certain powers that Congress has vested under Executive authority.⁸³ Thus, the President may act using his direct and implied executive powers to execute the objectives and needs of the country.⁸⁴

The Obama Administration touted DACA as "an enforcement policy."⁸⁵ However, many of DACA's opponents criticized DACA as a "legislative rule . . . which could only be promulgated in accordance with the Administrative Procedure Act (APA), which binds more federal agencies, including DHS."⁸⁶ In accordance with

⁷⁹ Michael D. Shear, *Trump Must Keep DACA Protections For Now, Judge Says*, N. Y. TIMES, Jan. 9, 2018, <https://www.nytimes.com/2018/01/09/us/trump-daca-improper.html>.

⁸⁰ *Id.*

⁸¹ McDonald, *supra* note 74.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Harold Krent, *Is Rescinding DACA Legal?*, LAW360 (Oct. 4, 2017) (citing Heckler v. Chaney, 470 U.S. 821, 831–32 (1985)).

⁸⁶ *Id.* See Crane v. Napolitano, 920 F. Supp. 2d 724, 730–31 (N.D. Tex. 2013), *aff'd sub nom. Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) (several ICE deportation officers and the State of Mississippi sued Napolitano on August 15, 2012 in response to the DACA memorandum). The plaintiffs claimed that the initiative violated:

(1) federal statutes requiring the initiation of removals; (2) federal law by conferring a non statutory form of benefit—deferred action—to more than 1.7 million aliens, rather than a form of relief or benefit that federal law permits on such a large scale; (3) federal law by conferring the legal benefit of employment authorization without any statutory basis and under the false pretense of "prosecutorial discretion;" (4) the constitutional allocation of

the APA, all agency rules initially have to be declared as a draft before they can become a law in order to give the public a period of time to comment on it.⁸⁷ As a result, the public shapes and ultimately alters agency rules. Under the APA, individuals have other rights.⁸⁸ Those claiming that they were legally wronged by an agency action are entitled to judicial review.⁸⁹

Although the Supreme Court has yet to hear a case about DACA's constitutionality, some of the legal discussions may be similar to those discussed in *Texas v. United States* regarding DAPA.⁹⁰ The Supreme Court deadlocked in its decision and affirmed the Fifth Circuit Judgment by an equally divided Court.⁹¹ In that case, the Fifth Circuit addressed immigration questions regarding DAPA that dealt with "federalism, separation of powers, and the ability and advisability, if any, of the Judiciary to hear and resolve such a dispute."⁹² The case reached the Court as a result of twenty-six states protesting DAPA under the APA and the Take Care Clause of the Constitution.⁹³ The states challenged DAPA on three grounds:

First, they asserted that DAPA violated the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment rulemaking. Second, the states claimed that DHS lacked the authority to implement the program even if

legislative power to Congress; (5) the Article II, Section 3, constitutional obligation of the executive to take care that the laws are faithfully executed; and (6) the Administrative Procedure Act through conferral of a benefit without regulatory implementation.

Id.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Torres v. U.S. Dep't of Homeland Sec.*, No. 17cv1840 JM(NLS), 2017 U.S. Dist. LEXIS 161406, at *14 (S.D. Cal. Sep. 29, 2017).

⁹⁰ *Texas v. United States*, 86 F. Supp. 3d 591, 605–06 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015).

⁹¹ *United States v. Texas*, 579 U. S. ___, 136 S. Ct. 2271, 195 L. Ed. 2d 638 (2016).

⁹² *Texas v. United States*, 86 F. Supp. 3d at 605–06.

⁹³ *Texas v. United States*, 809 F.3d at 146.

it followed the correct rulemaking process, such that DAPA was substantively unlawful under the APA. Third, the states urged that DAPA was an abrogation of the President's constitutional duty to 'take Care that the Laws be faithfully executed.'⁹⁴

The Court held that Congress intended that the APA have a judicial review process for those legally wronged by Agency action.⁹⁵ Thus, the states claimed they were entitled to such judicial review because of what they endured as a result of DAPA.⁹⁶ The Court held that Texas established that having to issue driver's licenses to DAPA recipients would result in a considerable cost for the state.⁹⁷ Texas calculated that if DAPA were enacted, there would be 500,000 Texas residents who could become recipients.⁹⁸ Texas would, in turn, spend \$130.89 on each of those 500,000 licenses, totaling millions of dollars.⁹⁹

The Court further held that Texas' financial burden was "fairly traceable to DAPA."¹⁰⁰ The Court stated that even if Texas could avoid the cost by charging for the licenses, "it could not avoid injury altogether."¹⁰¹ The Court held that the state's interests fell "within the zone of interest of the INA" which the state claimed was violated.¹⁰²

In conclusion, the Court failed to extend the DAPA ruling to DACA. The Court held that "DACA and DAPA are not identical."¹⁰³ The court reasoned that:

DACA involved issuing benefits to self-selecting applicants, and persons who expected to be denied

⁹⁴ *Id.* at 149.

⁹⁵ *Id.*

⁹⁶ *Id.* at 152.

⁹⁷ *Id.* at 155.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 156.

¹⁰¹ *Id.*

¹⁰² *Id.* at 162–63.

¹⁰³ *Id.* at 174.

relief would seem unlikely to apply. But the issue of self-selection is partially mitigated by the finding that the [g]overnment has publicly declared that it will make no attempt to enforce the law against even those who are denied deferred action (absent extraordinary circumstances).¹⁰⁴

Furthermore, the court noted that “[e]ligibility for DACA was restricted to a younger and less numerous population, which suggests that DACA applicants are less likely to have backgrounds that would warrant a discretionary denial.”¹⁰⁵ This shows that despite having similar DAPA and DACA applications, there were substantial factors that made a difference.¹⁰⁶ Lastly, the Court held “that the states have established a substantial likelihood that DAPA would not genuinely leave the agency and its employees free to exercise discretion,” even though there was a lack of evidence suggesting DACA did, in fact, have discretionary denials.¹⁰⁷ Thus, questions regarding DACA’s constitutionality still remained, though it is established that it was not as clearly unlawful at DAPA.¹⁰⁸

One of the basic questions regarding the constitutionality of DACA and other executive orders revolves around the doctrine of separation of powers and whether the President enjoys the power to make such an action that establishes immigration policy as well as other national benefits.¹⁰⁹ However, when it comes to immigration and DHS, it has been established that “decisions as to how to marshal DHS resources, how to best utilize DHS manpower, and where to concentrate its activities are discretionary decisions solely within the

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 175–76.

¹⁰⁸ *Id.* at 174.

¹⁰⁹ In *Texas v. United States*, the states claimed that in its expansion of DACA and in its enactment of DAPA, “DHS has not only abandoned its duty to enforce the laws as Congress has written them, but it has also enacted ‘legislation’ contrary to the Constitution and the separation of powers therein.” 86 F. Supp. 3d 591, 646 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *cert. granted*, 136 S. Ct. 906, 193 L. Ed. 2d 788 (2016).

purview of the Executive Branch, to the extent that they do not violate any statute or the Constitution.”¹¹⁰

Moreover, “as a general principle, the decision to prosecute or not prosecute an individual is, with narrow exceptions, a decision that is left to the Executive Branch’s discretion.”¹¹¹ However, ultimately,

[t]he conditions for entry [or removal] of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determinations should be based, have been recognized as matters *solely for the responsibility of the Congress*¹¹²

Thus, since both the President and Congress share some power over immigration and DHS, there was a constitutionality debate regarding whether DACA was actually legal or not. In the Constitution,

[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that ‘All legislative Powers herein granted shall be vested in a Congress of the United States’¹¹³

However, even if the President does not have a direct power from the Constitution to make laws, the President can also issue an order

¹¹⁰ *Id.* at 645.

¹¹¹ *Id.* at 644 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

¹¹² *Id.* at 645.

¹¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (Jackson, J., concurring).

that stems from an act of Congress.¹¹⁴ Thus, the President's power is not as limited as may seem because a lot of power has been vested in the Executive to "take care that the Laws be faithfully executed."¹¹⁵

In some situations, the President may act as a result of Congress' express or even implied approval and as such, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty."¹¹⁶ The President may also be somewhere in between having an express or implied power and having no power at all.¹¹⁷ In these instances, the President has to rely on his presidential powers.¹¹⁸ However, the President and Congress may have coexisting authority, or at least uncertainty regarding the distribution of authority, in which case, Congressional lack of concern or action, may give the President more independent responsibility.¹¹⁹ On the other hand, the President could be over-reaching and acting without any power or approval. In these circumstances, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."¹²⁰

Although DACA, often seen as all-encompassing—meaning that it deferred removal, gave work authorization, and gave social security numbers and certain benefits, the constitutionality debate

¹¹⁴ *Id.* at 585.

¹¹⁵ *Id.* at 587.

¹¹⁶ *Id.* at 635–36. As a result of the President's high level of authority in these situations, "[i]f his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power... the burden of persuasion would rest heavily upon any who might attack it." *Id.* at 636–37.

¹¹⁷ *Id.* at 637.

¹¹⁸ *Id.*

¹¹⁹ *Id.* Under this middle ground, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.*

¹²⁰ *Id.* When reviewing the President's decisions in these types of cases, "[c]ourts can sustain exclusive Presidential control in such a case only be disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 637–38.

does not apply equally to all parts.¹²¹ Since the President enjoys certain powers which allow him to implement laws that would help further the country's objectives, some aspects of DACA may well be within the President's power while others may not.¹²² Therefore, it makes more sense to look at DACA as these various parts and then weigh the President's power to actually implement all of these various components based on the Executive's plenary power and the power vested by Congress.¹²³

1. Deferred Removal

Through the Immigration and Nationality Act (INA), Congress "created a complex and detailed federal immigration scheme governing the conditions under which foreign nationals are admitted to and remain in the United States, and providing for the removal of non-citizens not lawfully admitted to this country."¹²⁴

The INA gives the Secretary of Homeland Security the power to enforce immigration and naturalization related laws.¹²⁵ DHS does not have the means to remove all removable people, which in turn gives immigration officials broad discretion.¹²⁶ In fact, DHS estimates that it can remove less than 400,000 undocumented individuals per year out of the more than eleven million people total.¹²⁷ While removing all eleven million people could be feasible in approximately thirty years, it remains unrealistic as it is not the best use of U.S. resources and each future president in office would have to commit to such an agenda.¹²⁸

¹²¹ McDonald, *supra* note 74.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Medina v. U.S. Dep't of Homeland Sec., No. C17-218-RSM-JPD, 2017 U.S. Dist. LEXIS 114477, at *4-5 (W.D. Wash. Mar. 14, 2017).

¹²⁵ *Id.* at *5.

¹²⁶ *Id.*

¹²⁷ Arpaio v. Obama, 797 F.3d 11, 16 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 900, 193 L. Ed. 2d 792 (2016), *reh'g denied*, 136 S. Ct. 1250, 194 L. Ed. 2d 247 (2016).

¹²⁸ Julia Preston, Alan Rappeport & Matt Richtel, *What Would It Take for Donald Trump to Deport 11 Million People and Build a Wall?*, N.Y. TIMES, May 19, 2016, <https://www.nytimes.com/2016/05/20/us/politics/donald-trump->

Furthermore, relocating millions of people who have already built their homes in the country is not the best image for the country. Thus, the Secretary may exercise prosecutorial discretion and decide not to remove someone or “defer” their removal action.¹²⁹ Deferred action is historically a common practice within DHS, and DHS officers enjoy wide discretion for humanitarian reasons or for the government’s own convenience.¹³⁰

Part of the goal when implementing DACA was enhancement of DHS’ resources.¹³¹ DACA “seek[s] not to decrease the total number of removals but to prioritize removal of individuals who pose a threat to public safety over removal of those who do not. The policy is designed to make the Department of Homeland Security’s expenditure of resources more efficient and effective.”¹³²

In making immigration enforcement decisions, the executive considers a variety of factors such as the danger posed to the United States of an individual’s unlawful presence, the impact of removal on the nation’s international relations, and the ‘human concerns’ of whether the individual ‘has children born in the United States, long ties to the community, or a record of distinguished military service.’ More generally, the Supreme Court has recognized that all agencies have discretion to prioritize in light of the Secretary’s and, ultimately, the President’s assessments ‘whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.’¹³³

immigration.html. Mass deportations would also pose problems of being achieved only through “military-style roundup” and dismissing legal procedures and constitutional restraints on officers. *Id.*

¹²⁹ *Medina*, 2017 U.S. Dist. LEXIS 114477 at *5.

¹³⁰ *Id.*

¹³¹ *Arpaio*, 797 F.3d at 15.

¹³² *Id.*

¹³³ *Id.* at 16 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831(1985)).

The DACA and DAPA memos explain that the deferred action policies “apply to individuals who ‘are extremely unlikely to be deported given [the] Department’s limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security.’”¹³⁴

Since deferred removal has been common practice, this part of DACA is not widely criticized as unconstitutional.¹³⁵ However, there are many DACA opponents who claim that deferring action on such a *grand scale* is beyond the scope of the executive’s discretion.¹³⁶ Ultimately, there are two possible arguments a court could make if the Court decides to review this specific issue:

(1) that a system that provides for such a broad change, which could potentially provide a path to permanent residency for one million people, is substantive in nature and not merely an enforcement measure;¹³⁷ or

(2) that Congress did not give the President the authority to defer deportation, and so, it cannot survive strict scrutiny. Though, other Presidents from different political ideologies have used their implicit or explicit authority from Congress to defer deportations.¹³⁸

Nonetheless, Congress did give DHS wide discretion in enacting the INA, and Janet Napolitano as Secretary under President Obama was entitled to exercise her discretion, whether or not the scale of her decision is of issue.¹³⁹ Moreover,

Prosecutorial discretion is one component of a much broader range of authority inherent in the executive branch’s responsibility to implement the law. The role of the executive branch of the government has never been limited to blindly administer laws passed by the legislative branch. The effective implementation of any law (whether criminal, tax, environmental,

¹³⁴ *Id.* at 17.

¹³⁵ McDonald, *supra* note 74.

¹³⁶ *Id.*

¹³⁷ Krent, *supra* note 85.

¹³⁸ *Id.*

¹³⁹ *Id.*

securities, or immigration law) requires the executive branch to interpret the law and to develop strategies to implement it.¹⁴⁰

Thus, the issue with DACA lies more so with the other components of the program.

2. Work Authorization

The work authorization was one of the components of DACA that made a huge difference for recipients.¹⁴¹ DACA applicants were eligible to apply for employment authorization and, if approved, were given a permit known as an Employment Authorization Document (EAD).¹⁴² DACA recipients then had the opportunity to obtain jobs, which they could not have had before their EAD's.¹⁴³

Many DACA critics have argued that DACA recipients and other undocumented immigrants take jobs from Americans.¹⁴⁴ In a statement regarding DACA's rescission, Attorney General Sessions stated that "[DACA] also denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens."¹⁴⁵

¹⁴⁰ *Understanding Prosecutorial Discretion in Immigration Law*, AM. IMMIGR. COUNCIL (May 26, 2011), <https://www.americanimmigrationcouncil.org/research/understanding-prosecutorial-discretion-immigration-law>.

¹⁴¹ Tom K. Wong, *DACA Recipients' Economic and Educational Gains Continue to Grow*, CTR. FOR AM. PROGRESS (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>.

¹⁴² Napolitano Memorandum, *supra* note 64.

¹⁴³ *Id.*

¹⁴⁴ Brennan Hoban, *Do Immigrants 'Steal' Jobs from American Workers?*, BROOKINGS (Aug. 24, 2017), <https://www.brookings.edu/blog/brookings-now/2017/08/24/do-immigrants-steal-jobs-from-american-workers/>. See Vanda Felbab-Brown, *The Wall* (Aug. 2017), <https://www.brookings.edu/essay/the-wall-the-real-costs-of-a-barrier-between-the-united-states-and-mexico/>.

¹⁴⁵ Jefferson Beauregard Sessions, U.S. Attorney Gen., U.S. DEP'T OF JUST., *Attorney General Sessions Delivers Remarks on DACA* (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

However, it defies logic to allow individuals lawful presence in the country but deny them the opportunity to work.

Furthermore, both sides of the debate seem to have statistics either proving or disproving that DACA recipients take jobs from Americans either because they are paid less or take jobs Americans do not want, rather than based on merit.¹⁴⁶ The argument is just part of the political rhetoric and both sides will prove what they want without the whole picture. Regardless of which side people fall on in the debate, it is clear that immigration and immigrant workers boost the economy and help create jobs, whether or not those immigrants are considered to have *stolen* those jobs.¹⁴⁷

A recent survey of DACA recipients showed that “[w]ork authorization is critical in helping DACA recipients participate more fully in the labor force. The data show that 91 percent of respondents are currently employed. Among respondents age 25 and older, employment jumps to 93 percent.”¹⁴⁸ Furthermore,

The data illustrate that DACA recipients continue to make positive and significant contributions to the economy, including earning higher wages, which translates into higher tax revenue and economic growth that benefits all Americans. In addition, DACA recipients are buying cars, purchasing their first homes, and even creating new businesses. The survey’s results also show that at least 72 percent of the top 25 Fortune 500 companies employ DACA recipients.¹⁴⁹

¹⁴⁶ Felbab-Brown, *supra* note 144. Felbab-Brown suggests that “[t]he impact of immigrant labor on the wages of native-born workers is low... However, undocumented workers often work the unpleasant, back-breaking jobs that native-born workers are not willing to do.” She provides a solution that “fixing immigration is not about mass deportations of people but about creating a legal visa system for jobs Americans do not want. And it is about providing better education opportunities, skills-development and retooling, and safety nets for American workers.” *Id.*

¹⁴⁷ Julia Preston, *Immigrants Aren’t Taking Americans’ Jobs, New Study Finds*, N.Y. TIMES, Sept. 21, 2016, <https://www.nytimes.com/2016/09/22/us/immigrants-arent-taking-americans-jobs-new-study-finds.html>.

¹⁴⁸ Wong, *supra* note 141.

¹⁴⁹ *Id.*

Overall, DACA recipients are estimated to provide \$460.3 billion to the U.S. economy in the next ten years.¹⁵⁰ However, that economic growth could be lost without DACA.¹⁵¹

The question that still remains is whether allowing DACA recipients to legally work was constitutional. There is not much guidance in answering this question. There have been other work-related amnesties in the past.¹⁵² Furthermore, although some may dislike that DACA recipients have jobs, the legal issue with DACA does not seem to lie in the work authorization component of the program.¹⁵³

3. Social Security and Benefits

As part of DACA, recipients are eligible to receive social security numbers.¹⁵⁴ The social security cards say that they are “valid for work only with DHS Authorization,” which is what the EAD is for.¹⁵⁵ It seems that DACA opponent’s biggest frustrations with DACA stemmed from this part of the program.¹⁵⁶ Opponents saw the social security card as giving recipients public benefits.¹⁵⁷ However, the constitutionality debate regarding this component of DACA is not even largely about immigration but rather about federalism.¹⁵⁸

Americans have rights to social security benefits from the Federal Government.¹⁵⁹ However, with DACA, merely having a social

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *See supra* Section II.

¹⁵³ McDonald, *supra* note 74.

¹⁵⁴ *Types of Social Security Cards*, SOC. SEC. ADMIN. (Feb. 17, 2018), <https://www.ssa.gov/ssnumber/cards.htm> (last visited Apr. 6, 2019).

¹⁵⁵ *Id.*

¹⁵⁶ McDonald, *supra* note 74.

¹⁵⁷ *Id.*

¹⁵⁸ *Texas v. United States*, 86 F. Supp. 3d 591, 605–06 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *cert. granted*, 136 S. Ct. 906, 193 L. Ed. 2d 788 (2016).

¹⁵⁹ *Understanding the Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/pubs/EN-05-10024.pdf> (Feb. 17, 2018). Although there are

security number does not mean that recipients are entitled to those same exact benefits.¹⁶⁰ In fact, DACA beneficiaries cannot obtain access to federal benefits.¹⁶¹ These federal benefits that DACA recipients are ineligible for include federal medical coverage such as the Affordable Care Act and federal student financial aid.¹⁶² DACA recipients can have benefits only if provided by the states of the individual's residency.¹⁶³

Some states are more willing than others to provide benefits for DACA recipients and other undocumented individuals.¹⁶⁴ The federalism debate happens when the federal government forces the states to recognize their benefits as mandatory.¹⁶⁵

other sources of benefits, the Federal Government, through the Social Security Administration, handles many of the benefit programs such as retirement, Medicare, and disability among others. *Id.*

¹⁶⁰ *Fact Sheet: Immigrants and Public Benefits*, NAT'L IMMIGR. FORUM (Aug. 21, 2018), <https://immigrationforum.org/article/fact-sheet-immigrants-and-public-benefits/>.

¹⁶¹ *Life after DACA – FAQ*, CATHOLIC LEGAL IMMIGR. NETWORK, INC. (2016), <https://cliniclegal.org/resources/articles-clinic/life-after-m-daca-faq> (last visited Apr. 7, 2019).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ NAT'L IMMIGR. FORUM, *supra* note 160. Twenty-six states provide benefits to undocumented individuals. *Id.* See also, *Mapping Public Benefits for Immigrants in the United States*, PEW RES. CTR. (Sept. 24, 2014), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/09/mapping-public-benefits-for-immigrants-in-the-states>.

¹⁶⁵ See *Printz v. U.S.*, 521 U.S. 898, 920 (1997) (explaining that “[m]uch of the current U.S. Federalism has been developed as a reaction to the failures of the Articles of Confederation, which persuaded the Framers that using States as instruments of national governance was ineffectual and provocative of conflict between the states and national government”). Generally, Federalism is described as:

[A] system of government in which the same territory is controlled by two levels of government. Generally, an overarching national government is responsible for the federal governance, governing the issues that affect the entire country, while the smaller subdivisions, states, and cities, govern the issues of local concern. Both the national government and the smaller political subdivisions have the power to make laws and both have a certain level of autonomy from each other.

Before DACA, a similar question came before the Supreme Court in *Plyler*.¹⁶⁶ In that case, the Court reviewed a Texas law that denied undocumented children free public education.¹⁶⁷ The Court noted that, “[t]he Fourteenth Amendment provides that ‘[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws.’”¹⁶⁸ The Court held that, “[W]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”¹⁶⁹

Furthermore, the Court reasoned that:

To permit a State to employ the phrase ‘within its jurisdiction’ in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.¹⁷⁰

Federalism, Cornell Law School, LEGAL INFO. INST. (Feb. 23, 2018), <https://www.law.cornell.edu/wex/federalism>.

¹⁶⁶ *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 210.

¹⁶⁹ *Id.* (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

¹⁷⁰ *Plyler*, 457 U.S. at 213.

While the Court noted that receiving a public education is not a constitutional “right,” it also made clear that education is not a “benefit”, because education is an integral part of society that impacts the democratic system.¹⁷¹ The Court held that:

In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.¹⁷²

In conclusion, the court held that the states did not show that it had a substantial interest in denying education.¹⁷³

A similar question was presented to the Fifth Circuit in *Texas v. United States* regarding DAPA.¹⁷⁴ Although the central issue revolved around state issued driver’s licenses, the general issue was the benefits that the federal government gave to undocumented individuals with state funded resources.¹⁷⁵ The Court held that Texas’ financial burden can be “fairly traceable to DAPA.”¹⁷⁶ Thus, the Court concluded that the States had a claim against DAPA and thus affirmed the preliminary injunction.¹⁷⁷ However, even if DAPA is analogous to DACA, the Court did not establish that DACA is also unconstitutional.¹⁷⁸ It also defies logic to allow DACA beneficiaries to stay in the country, work, and pay taxes but deny them the same benefits other tax payers enjoy. Thus, even this question about social security and benefits remains open to interpretation.

¹⁷¹ *Id.* at 221.

¹⁷² *Id.* at 226.

¹⁷³ *Id.* at 230.

¹⁷⁴ *Texas v. United States*, 809 F.3d 134, 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 156.

¹⁷⁷ *Id.* at 188.

¹⁷⁸ *Id.* at 174.

C. DACA's Rescission

After looking at the various components of DACA and weighing each part's constitutionality, a question that remains is, what, if anything, can be done if DACA were constitutional and President Trump rescinded it based on inaccuracies? Since DACA was an executive order, this Administration could argue that President Obama's enforcement policies should not bind his successor and should be free from judicial review.¹⁷⁹ However, President Trump will likely continue to be challenged for his decisions.

There are some possible enforcement mechanisms against President Trump's decision.¹⁸⁰ First, there are constitutional safeguards should someone allege and succeed in claiming that President Trump's revocation of DACA was discriminatory.¹⁸¹ However, based on President Trump's campaign rhetoric, this claim is unlikely to succeed.¹⁸² Second, individuals can argue "detrimental reliance" on DACA that should not be taken away absent review to determine its arbitrariness.¹⁸³ DACA recipients could argue that they have paid for education, attained careers, and paid taxes in reliance of DACA.¹⁸⁴ This could lead to the argument that the government was unjustly enriched by DACA.¹⁸⁵ On the other hand, this claim is also unlikely to succeed because DACA was not intended to give enforceable rights but rather last so long as the President's policies did not change, which they now have under President Trump.¹⁸⁶ Third, a court may review based on a "legal decision" rather than a question of "agency priority," which courts cannot review.¹⁸⁷ The Court may choose to rule on it as a legal decision because the Court

¹⁷⁹ Krent, *supra* note 85.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

has yet to rule on DACA's revocation.¹⁸⁸ Overall, if DACA is considered constitutional, Trump's reversal may still be valid unless courts look at the detrimental reliance or assert judicial review, both of these are possible.¹⁸⁹

Furthermore, the United States Court of Appeals for the Second Circuit denied the Department of Homeland Security's writ of mandamus and lifted a stay of the district court's discovery order for evidence missing from the record regarding DACA's rescission.¹⁹⁰ The plaintiffs identified evidence missing from the record.¹⁹¹ The plaintiffs noted that the memorandum terminating DACA stated that USCIS was unable to find specific DACA denials based on discretion even though the applicant satisfied the requirements.¹⁹² Thus, the plaintiffs argued that the evidence used by then-Acting Secretary Duke was not in the Court record.¹⁹³

The Court reasoned that:

It is difficult to imagine that a decision as important as whether to repeal DACA would be made based upon a factual record of little more than 56 pages, even accepting that litigation risk was the reason for repeal. Accordingly, 'there is a strong suggestion that the record before the [District Court] was not complete,' entitling the plaintiffs to discovery regarding the completeness of the record.¹⁹⁴

Thus, the government will have to complete the factual record behind the DACA rescission. Whether or not the evidence will prove anything significant or make a difference is unknown. However, more information will at least help give more insight about DACA and why it was rescinded.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *In re Nielsen*, No. 17-3345, 2017 U.S. App. LEXIS 26821, at *8 (2d Cir. Dec. 27, 2017).

¹⁹¹ *Id.*

¹⁹² *Id.* at *12.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at *12.

Even if the above methods for review of DACA's revocation fail to be introduced or succeed, individuals will likely continue to raise claims against the government for their DACA revocation. For example, the plaintiff in *Inland v. Duke*, a 23-year old named Jesus Alonso Arreola Robles, lost his deferred action status and work authorization.¹⁹⁵ The Plaintiff had lived in the United States since he was one, received DACA protections three times (2012, 2014, and 2016), worked two to three jobs at once, supported his family, and did not have any criminal convictions.¹⁹⁶ The Plaintiff's DACA status was to expire in August 2018, but it was revoked early in March 2017.¹⁹⁷ The alleged reasoning behind his revocation was that he was driving someone who U.S. Customs and Border Patrol (CBP) agents had arrested near San Diego, California.¹⁹⁸

As a result, they arrested the Plaintiff for "suspicion of aiding in the smuggling of undocumented immigrants" but did not charge him with a crime.¹⁹⁹ Nevertheless, they issued the Plaintiff a Notice to Appear (NTA), which commenced the removal action.²⁰⁰ The immigration judge released him following the hearing.²⁰¹ Thereafter, USCIS notified the Plaintiff that his DACA status and EAD were automatically terminated.²⁰² The Plaintiff sued, claiming that notice of his DACA termination was improper as it was not given with sufficient time and he was not given an opportunity to respond or appeal the decision.²⁰³ Furthermore, the Plaintiff claimed that he lost his job due to his DACA and EAD revocations, which resulted in additional hardship.²⁰⁴

The Court held for the Plaintiff by granting his motion for a preliminary injunction.²⁰⁵ The Court reasoned that the DACA

¹⁹⁵ *Inland v. Duke*, No. EDCV 17-2048 PSG (SHKx), 2017 U.S. Dist. LEXIS 203307, at *1 (C.D. Cal. Nov. 20, 2017).

¹⁹⁶ *Id.* at *3–4.

¹⁹⁷ *Id.* at *3–5.

¹⁹⁸ *Id.* at *4.

¹⁹⁹ *Id.* at *4–5.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at *6.

²⁰⁵ *Id.* at *32.

revocation had to be in accordance with the Napolitano Memo and the Standard Operating Procedures.²⁰⁶ Moreover, the Court held that the Ninth Circuit has held that APA jurisdiction exists where “discretion has been legally circumscribed by various memoranda.”²⁰⁷ Thus, the court was able to review USCIS’ decision because there are rules in place to review agency action.²⁰⁸ The court held that agency rules must be logical, and that deportation decisions that are unrelated to an individual’s suitability to be in the U.S. are “arbitrary and capricious.”²⁰⁹ Moreover, an issuance of an NTA is insufficient to terminate an individual’s DACA and EAD per the APA guidelines.²¹⁰ The Ninth Circuit Court of Appeals has held in the past that losing out on the chance to pursue a profession amounts to “irreparable harm,” and the Court in this case found the Plaintiff’s argument persuasive.²¹¹ In conclusion, the Court held that “the harms that would be experienced by Plaintiff and his family . . . outweigh any potential injury to Defendants. In addition, the public has a strong interest in ensuring that the nation’s immigration laws are robustly—and *fairly*—enforced. These factors therefore weigh in Plaintiff’s favor.”²¹²

Most recently, on January 9, 2018, Judge Alsup from the United States District Court for the Northern District of California issued a preliminary injunction blocking DACA’s recession pending a final judgment that was brought forth by numerous plaintiffs.²¹³ Judge

²⁰⁶ *Id.* at *7–8 (quoting *Alcaraz v. Immigration & Naturalization Serv.*, 384 F.3d 1150, 1161 (9th Cir. 2004)).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at *7 (quoting *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003)).

²⁰⁹ *Id.* at *16 (quoting *Judulang v. Holder*, 565 U.S. 42, 55 (2011)).

²¹⁰ *Id.* at *16–17.

²¹¹ *Id.* at *27–28 (quoting *Enyart v. Nat’l Conf. of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011)).

²¹² *Id.* at *31–32.

²¹³ *Regents of the Univ. of Cal. v. Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2018 U.S. Dist. LEXIS 4036, at *1 (N.D. Cal. Jan. 9, 2018). The plaintiffs in this case filed five similar lawsuits. “The Regents of the University of California, on its own behalf and on behalf of its students, and Janet Napolitano, in her official capacity as President of the University” brought the first. California, Maine, Maryland, and Minnesota brought the second. The “City of San Jose, on its own behalf and on behalf of its employees who are DACA recipients” filed the third.

Alsup ordered that DHS allow DACA beneficiaries to renew their status, while ensuring fair discretion on a case-by-case basis.²¹⁴ However, applications from new applicants were not ordered to be processed and the advance parole feature was discontinued.²¹⁵ Judge Alsup held that the plaintiffs established the four elements required for a preliminary injunction: “(1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the public interest.”²¹⁶

Regarding the first element, likelihood of success on the merits, Judge Alsup held that the plaintiffs showed likelihood in succeeding:

[O]n their claim that the rescission was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. Specifically, plaintiffs are likely to succeed on their claims that: (1) the agency’s decision to rescind DACA was based on a flawed legal premise; and (2) government counsel’s supposed “litigation risk” rationale is a post hoc rationalization and would be, in any event, arbitrary and capricious.²¹⁷

Regarding the second element, irreparable harm, Judge Alsup held that plaintiffs could show harm in rescinding DACA.²¹⁸ First, individual DACA beneficiaries will lose their lawful presence in the country, be forced to give up their jobs, and face possible deportations.²¹⁹ Moreover, entity plaintiffs will lose important

“[I]ndividual DACA recipients Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn” initiated the fourth lawsuit. The “County of Santa Clara and the Service Employees International Union Local 521” brought the fifth lawsuit. *Id.* at *35–37.

²¹⁴ *Id.* at *91.

²¹⁵ *Id.*

²¹⁶ *Id.* at *60 (quoting *Winter v. Natural Resources Defense Council Inc.*, 555 U.S. 7, 20 (2008)).

²¹⁷ *Id.* at *61.

²¹⁸ *Id.*

²¹⁹ *Id.*

students and employees who they relied on because of their DACA status.²²⁰

As to the last two factors, Judge Alsup held that hundreds of thousands of people will be affected which is a significant public interest.²²¹ Moreover, it is odd that President Trump, who is the executive, seemed in favor of the very act that the agency was rescinding as proven by a September 2017 tweet by the President stating “[d]oes anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!”²²²

Moreover, President Trump encouraged Congress, tweeting: “Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can’t, I will revisit this issue!”²²³ These statements, along with President Obama’s reasoning for implementing DACA in the first place, prove how significant DACA is and how detrimental it would be to lose it before the case is heard on its merits.²²⁴

Moreover, on a larger scale, the whole country will face difficulties.²²⁵ Employers could lose valuable employees.²²⁶ As a result, those employees who are losing their jobs will not only lose the ability to contribute to the country as taxpayers, but may not be able to support their own families.²²⁷ Moreover, those individuals and their families will lose healthcare benefits.²²⁸ The public will feel the burden of these consequences.²²⁹ Thus, the public interest outweighs any hardship DHS could face.²³⁰

²²⁰ *Id.* at *87. Entity plaintiffs include universities, states, and cities.

²²¹ *Id.* at *89.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at *90.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

On February 26, 2018, the Supreme Court declined to take Judge Alsup's decision under review.²³¹ This was considered a hindrance for President Trump because the injunction will stay in place for now and DACA will not end.²³² The Supreme Court did not discuss the merits, but instead said that the case should take its course through the appellate process.²³³ The next court that will hear the case is the U.S. Court of Appeals for the Ninth Circuit, a fairly liberal court.²³⁴ However, until a final decision is made, many uncertainties remain with the program.²³⁵

Individuals like Mr. Robles and the current litigation plaintiffs who are losing their DACA status or face uncertainties as to their status will suffer serious setbacks. Although DACA did not give lawful status, it did give lawful presence.²³⁶ Consequences of DACA's rescission include economic and employment repercussions and identification concerns.²³⁷ DACA recipients, who were eligible for better paying jobs with the employment cards are likely to lose their jobs.²³⁸ Furthermore, these individuals "came out of the

²³¹ Domenico Montanaro, *Supreme Court Declines To Take DACA Case, Leaving It In Place For Now*, NAT'L PUB. RADIO (Feb. 26, 2018), <https://www.npr.org/2018/02/26/588813001/supreme-court-declines-to-take-up-key-daca-case-for-now>.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 25, 2018), <https://www.uscis.gov/archive/frequently-asked-questions>.

²³⁷ *Study: The Impact of Deferred Action for Childhood Arrivals (DACA) Program Repeal on Jobs*, CTR. FOR AM. PROGRESS & FWD.US (Feb. 25, 2018), <https://dreamers.fwd.us/wp-content/uploads/2017/08/20170823-DACA-Job-Loss-Report.pdf> [https://files.eqcf.org/wp-content/uploads/2018/05/45_6-Plaintiffs-Supplemental-Record-Vol6.pdf]. It is estimated that around 700,000 DACA recipients could lose their jobs over the next two years. *Id.*

²³⁸ *Id.* See also Giovanni Peri, *The Economic Cost of Repealing DACA*, ECONOFACT (Sept. 11, 2017), <http://econofact.org/the-economic-cost-of-repealing-daca> ("DACA allowed these young individuals to find jobs that offer better pay for their skills and encouraged them to achieve more schooling, as they could benefit from such investment by accessing the legal labor market." Moreover, "[t]he idea that 'downgrading' the working options of DACA recipients, by removing their legal status or, even worse, by deporting them, will create skilled jobs that unemployed Americans can and will take, seems particularly farfetched now").

shadows” to apply for DACA and now face losing the right to be in the country.²³⁹

One of the scariest and most realistic consequences of DACA’s rescission is the rise in deportations.²⁴⁰ The next section will discuss the deportation process generally and constitutional protections for those facing removal.

IV. DEPORTATIONS

DACA recipients and many other undocumented immigrants fear being deported under the Trump Administration.²⁴¹ So what legal rights do individuals in this situation have? Deportations are civil matters, unless they are a consequence of a criminal action, but the actual removal process is civil.²⁴² Regardless, there are some constitutional protections afforded to people facing removals.²⁴³ While the government enjoys a lot of discretion in removing undocumented individuals, it is important to know that there still are some limited rights and protections afforded to those individuals, including Due Process rights.²⁴⁴

²³⁹ Kuchins, *supra* note 48, at 714.

²⁴⁰ Ron Nixon, *Immigration Arrests and Deportations Are Rising*, *I.C.E. Data Shows*, N.Y. TIMES, Dec. 14, 2018, <https://www.nytimes.com/2018/12/14/us/politics/illegal-immigrant-arrests-deportations-rise.html>.

²⁴¹ Kate Sweeny, *For Dreamers, Fear of Deportation is Scary – But Waiting is Even Worse*, WASH. POST, Apr. 27, 2018, https://www.washingtonpost.com/news/posteverything/wp/2018/04/27/for-dreamers-fear-of-deportation-is-scary-but-waiting-is-even-worse/?utm_term=.9357817fdb50. Apart from worrying about being deported, the uncertainty may be even more stressful for some. *Id.*

²⁴² *Medina v. U.S. Dep’t of Homeland Sec.*, No. C17-218-RSM-JPD, 2017 U.S. Dist. LEXIS 114477, at *4–5 (W.D. Wash. Mar. 14, 2017).

²⁴³ *Due Process in Immigration Proceedings*, United States Court of Appeals for the Ninth Circuit, at E-1, https://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/E.pdf (citing *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005)) (last visited Apr. 7, 2019); *Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir. 2013); *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012); *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009)).

²⁴⁴ *Id.*

There have been many news articles and stories about extreme cases of removals. One example reported in April 2017 involved Juan Manuel Montes-Bojorquez, a 23-year-old DACA recipient who was brought to the United States as a child.²⁴⁵ He is thought to be the first person deported with DACA status.²⁴⁶ U.S. Customs and Border Patrol officer approached Montes-Bojorquez when he did not have his DACA identification.²⁴⁷ Thereafter, he was held in custody, interrogated, and asked to execute documents.²⁴⁸ Within three hours, he was left in Mexico.²⁴⁹ Montes-Bojorquez has filed a lawsuit against the government with help from the National Immigration Law Center.²⁵⁰ His attorney, Nora A. Preciado said that Montes-Bojorquez “was funneled across the border without so much as a piece of paper to explain why or how”²⁵¹

Another extreme example of the government cracking down on undocumented immigrants involves Oscar and Irma Sanchez, parents to two-month-old Isaac Enrique Sanchez.²⁵² The baby had a serious condition that could only be cured with surgery.²⁵³ However, the parents would need to travel to another hospital to save their son, which required passing a U.S. Customs and Border Patrol checkpoint.²⁵⁴

While the couple thought about their situation, a border patrol officer arrived at the hospital for them.²⁵⁵ The couple agreed that the

²⁴⁵ Richard Gonzalez, *DREAMer Deportation Case Raises Questions On Trump's Deferred Action Policy*, NAT'L PUB. RADIO (Apr. 18, 2017), <https://www.npr.org/sections/thetwo-way/2017/04/18/524610150/first-dreamer-protected-by-deferred-action-program-is-deported>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² John Burnett, *Border Patrol Arrests Parents While Infant Awaits Serious Operation*, NAT'L PUB. RADIO (Sept. 20, 2017), <https://www.npr.org/2017/09/20/552339976/border-patrol-arrests-parents-while-infant-awaits-serious-operation>.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* It is suspected that a nurse at the hospital alerted the authorities.

officer would escort them to the other hospital for their baby to have the operation but that once they got to the hospital, they would be placed into custody by immigration officials.²⁵⁶ At the hospital, the couple, who had no criminal history, was never left alone because a U.S. Customs and Border Patrol Officer constantly followed them.²⁵⁷ Furthermore, both parents were individually taken to get booked.²⁵⁸ This case raised questions about why the government treated the Sanchez family like hard criminals even though they did not pose a safety risk.²⁵⁹ This case also raised questions about tracking people in sensitive areas such as hospitals, places of worship, and schools.²⁶⁰

There have been many other situations similar to the Montes-Bojorquez and Sanchez cases. Some may question how the

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* According to U.S. Immigration and Customs Enforcement:

locations treated as sensitive locations under ICE policy would include, but are not be limited to: Schools, such as known and licensed daycares, pre-schools and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; as well as scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer, during periods when school children are present at the stop; Medical treatment and health care facilities, such as hospitals, doctors' offices, accredited health clinics, and emergent or urgent care facilities; Places of worship, such as churches, synagogues, mosques, and temples; Religious or civil ceremonies or observances, such as funerals and weddings; and [d]uring a public demonstration, such as a march, rally, or parade.

On the other hand, courthouses are not treated as sensitive locations. Although "enforcement actions are not to occur at or be focused on sensitive locations" there are exceptions when "exigent circumstances exist; other law enforcement actions have led officers to a sensitive location, or prior approval is obtained from a designated supervisory official." *FAQ on Sensitive Locations and Courthouse Arrests*, U.S. IMMIGR. & CUSTOM ENFORCEMENT, <https://www.ice.gov/ero/enforcement/sensitive-loc> (last visited Apr. 6, 2018).

government can get away with these extreme acts of removal. The answer is that the government has a lot of leeway in deportation decisions. There are two major ways in which the government is able to deport people in large numbers without much opposition. Those methods include prosecutorial discretion and stipulated removal, which will be discussed in the following sections, as well as various rights afforded to people facing removal because of these methods.

A. Prosecutorial Discretion

Prosecutorial discretion has been defined as “the authority of an agency or officer to decide what charges to bring and how to pursue each case.”²⁶¹ When an officer decides not to deport an individual, the officer has “favorably” utilized their discretion.²⁶² Moreover, U.S. law has consistently utilized a priority system in deciding when to prosecute.²⁶³ The Supreme Court “has made it clear that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”²⁶⁴

When it comes to immigration, prosecutorial discretion can work for both removals and deferred action. The fact is that “[t]he federal government has broad and plenary powers over the subject of immigration and the status of non-citizens.”²⁶⁵ Under the Immigration and Nationality Act (INA), the Secretary of Homeland Security has the power of “administration and enforcement of all laws relating to immigration and naturalization.”²⁶⁶ Obviously, politics play a role, meaning that the Secretary can exercise

²⁶¹ *Understanding Prosecutorial Discretion in Immigration Law*, AM. IMMIGR. COUNCIL (May 26, 2011), <https://www.americanimmigrationcouncil.org/research/understanding-prosecutorial-discretion-immigration-law>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

²⁶⁵ *Medina v. U.S. Dep’t of Homeland Sec.*, No. C17-218-RSM-JPD, 2017 U.S. Dist. LEXIS 114477, at *4 (W.D. Wash. Mar. 14, 2017) (citing *Arizona v. United States*, 567 U.S. 387 (2012)).

²⁶⁶ *Id.* at *5 (citing 8 U.S.C. § 1103(a)(1)).

discretion to remove or defer removal based on how liberal or conservative the administration is.

The Department of Homeland Security has outlined that:

Department personnel have full authority to arrest or apprehend an alien whom an immigration officer has probable cause to believe is in violation of the immigration laws. They also have full authority to initiate removal proceedings against any alien who is subject to removal under any provision of the INA, and to refer appropriate cases for criminal prosecution. The Department shall prioritize aliens described in the Department's Enforcement Priorities (Section A) for arrest and removal. This is not intended to remove the individual, case-by-case decisions of immigration officers.²⁶⁷

B. Stipulated Removals

Stipulated removal is a process in which individuals sign away their right to a hearing before an immigration judge and agree to formal removal from the United States.²⁶⁸ Although the process of stipulated removals seems voluntary, there has been some disapproval of it.²⁶⁹ One of the reasons behind the negativity is that individuals waive their right to their day in court even though they may be eligible to remain in the country had they seen the judge.²⁷⁰ Stipulated removals do not take into consideration anything that a judge would, "including the length of their presence here, their family ties to the U.S., their status as crime victims, or their fear of

²⁶⁷ John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest*, DEP'T OF HOMELAND SEC. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

²⁶⁸ Jennifer Lee Koh, Jayashri Srikantiah, and Karen C. Tumlin, *Deportation Without Due Process*, NAT'L IMMIGR. LAW CTR., at 1 (Sept. 2011), <https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf>.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

being persecuted or tortured if they are returned to their home country.”²⁷¹

The government has deported more than 160,000 people in the past ten years through stipulated removals.²⁷² Of these individuals deported through stipulated removal, 96% were not represented by lawyers.²⁷³ Stipulated removals have to be signed “knowingly, voluntarily, and intelligently.”²⁷⁴ However, there have been many cases of coercion.²⁷⁵ Individuals are told that they can get released from jail by signing the form.²⁷⁶ However, they could also be released on bond if they lacked criminal history.²⁷⁷ Moreover, individuals who are coerced into signing are held in detention centers far away from family.²⁷⁸ Many of these people do not speak English, and the majority of them pose no risk.²⁷⁹

Stipulated removals have increased throughout the country.²⁸⁰ The process has been supported with inducements at all levels, from Immigration and Customs Enforcement (ICE) officers to immigration judges.²⁸¹ ICE officers are often given quotas for stipulated removals, regardless of whether the process is being carried out

²⁷¹ *Id.* at 2.

²⁷² *Id.* at 1.

²⁷³ *Id.* Most immigrants who are deported through stipulated removals lack resources and, thus, do not have legal counsel. As such, they need the government to give them the legal information about stipulated removals. However, ICE officials are often wrong and deceptive when it comes to explaining the law. *Id.* at 2.

²⁷⁴ *Id.* at 2.

²⁷⁵ *Id.* Moreover, there is no indication that stipulated removals are forbidden, discouraged, or at least treated with more sensitivity when it comes to susceptible groups such as those with mental challenges and juveniles. *Id.* at 6–7.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ Jennifer Lee Koh, Jayashri Srikantiah, and Karen C. Tumlin, *Deportation Without Due Process*, NAT’L IMMIGR. LAW CTR., at 1–2, 6, 15 (Sept. 2011), <https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf>.%. Around 80 percent of those removed through stipulated removals had been detained civilly for lacking proper immigration paperwork and not because of a crime. *Id.* at 7.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 3.

fairly.²⁸² Furthermore, judges receive “case completion” credit for moving through their caseload.²⁸³ Although the process is expedited and thus, saves time and money, it comes with a cost of Due Process and rule of law violations.²⁸⁴

There have been suggestions as to how to improve stipulated removals to ensure that people’s rights are not being overlooked.²⁸⁵ A judge could hold a short hearing to ensure that the stipulated removal is understood and being signed knowingly, voluntarily, and intelligently.²⁸⁶ Furthermore, there could be more lawyers and translators appointed to oversee stipulated removals.²⁸⁷ Moreover, there should be more education for both the individuals facing removal and the officers.²⁸⁸ Finally, there should be some limitations in stipulated removal procedures for individuals who are vulnerable and may be eligible to remain in the country.²⁸⁹

C. Individual Rights

Individuals facing removal have limited rights to ensure that they are treated fairly under the laws of the United States. The Courts have held that although immigration proceedings do not require full constitutional protection, the proceedings must abide by the Fifth Amendment Due Process.²⁹⁰ Furthermore, immigrations facing deportation have a right to a fair hearing and a chance to present evidence.²⁹¹ Therefore, deporting an individual without a hearing may be a violation of their Due Process right.²⁹²

Under 28 U.S.C. § 2241(c)(3) and 8 U.S.C. § 1252 individuals may have courts review immigration proceedings initiated by agency

²⁸² *Id.* at 5.

²⁸³ *Id.*

²⁸⁴ *Id.* at 1–2.

²⁸⁵ *Id.* at 18.

²⁸⁶ *Id.* (citing 8 C.F.R. § 1003.25(b)).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Due Process in Immigration Proceedings*, *supra* note 243 at E-1.

²⁹¹ *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000).

²⁹² *Due Process in Immigration Proceedings*, *supra* note 243 at E-1.

actions.²⁹³ As a result, “[f]ederal district courts may grant a writ of habeas corpus if a petitioner is ‘in custody in violation of the Constitution or laws or treaties of the United States.’”²⁹⁴

Moreover, the Supreme Court has explained that “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”²⁹⁵ However, “Congress began limiting habeas jurisdiction in immigration cases in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).”²⁹⁶ In 2005, Congress passed the REAL ID Act which “expressly eliminated habeas review over all final orders of removal, but restored to the appellate courts jurisdiction over ‘constitutional claims or questions of law’ in all cases—criminal and non-criminal.”²⁹⁷

Although Congress has attempted to limit the rights of undocumented individuals facing removals under IIRIRA and the REAL ID Act, judicial review has not been completely eliminated.²⁹⁸ There are laws in place such as §§ 1252(a)(5) and 1252(b)(9) which help make certain that immigrants get their “day in court.”²⁹⁹

Besides the right to their day in court, undocumented individuals facing deportation orders are also protected from indefinite detentions.³⁰⁰ In reviewing detentions, “if removal is not reasonably foreseeable, the court should hold continued detention unreasonable . . .”³⁰¹ There is a six-month period for the government to show the reasonableness of removal.³⁰² That does not mean that after six months detainees will be released.³⁰³ However, the Court has held

²⁹³ *Medina v. U.S. Dep’t of Homeland Sec.*, No. C17-218-RSM-JPD, 2017 U.S. Dist. LEXIS 114477, at *25 (W.D. Wash. Mar. 14, 2017).

²⁹⁴ *Id.*

²⁹⁵ *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

²⁹⁶ *Medina*, 2017 U.S. Dist. LEXIS 114477, at *26.

²⁹⁷ *Singh v. Gonzales*, 499 F.3d 969, 977 (9th Cir. 2007).

²⁹⁸ *Medina*, 2017 U.S. Dist. LEXIS 114477, at *36–37 (quoting *Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007)).

²⁹⁹ *Id.*

³⁰⁰ *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

³⁰¹ *Id.* at 690.

³⁰² *Id.* at 701.

³⁰³ *Id.*

that indefinite detentions pose a constitutional issue.³⁰⁴ The Fifth Amendment Due Process Clause stops the government from depriving individuals of their liberty, a significant part of that is freedom from imprisonment.³⁰⁵

Individuals in immigration court also have a right to counsel.³⁰⁶ However, the individual is generally responsible for obtaining and paying for counsel.³⁰⁷ Unlike criminal defendants, detained immigrants do not have the same Sixth Amendment appointment of counsel rights.³⁰⁸ While this is a huge obstacle for many; the right to counsel still exists.³⁰⁹

V. FUTURE PREDICTIONS

In rescinding DACA, President Trump gave Congress six months to act. President Trump explained that DACA would not end abruptly but rather the “[p]ermits will not begin to expire for another six months, and will remain active for up to 24 months. Thus, in effect, I am not going to just cut DACA off, but rather provide a window of opportunity for Congress to finally act.”³¹⁰ Although the six months mark no longer applies after Judge Alsup’s decision, Congress should act as if it wants a legislative rule rather than a judicial one.³¹¹ It takes Congress sometimes years, let alone just a few months to act on anything. Thus, skeptics, cynics, and even

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 690.

³⁰⁶ Ingrid Eagly, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* Some of the obstacles include finding an attorney, especially once detained; paying for an attorney; and getting attorneys to remote detention centers. Statistically, only 37% of immigrants are represented by attorneys. Of those who are represented, their chances of success are much higher, especially since the government always has trained attorneys on its side. *Id.*

³¹⁰ Trump, *supra* note 62.

³¹¹ *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2018 U.S. Dist. LEXIS 4036, at *1 (N.D. Cal. Jan. 9, 2018).

realists who want to see Congress enact some sort of DACA implementation and immigration reform should be worried.

Furthermore, President Trump's goal for Congress to enact DACA through an official act does not come without strings.³¹² President Trump gave Congress a list of demands in exchange for immigration reform that would include a DACA-like policy.³¹³

One of President Trump's demands to Congress is "to build a wall along the southern border—a centerpiece of his presidential campaign"³¹⁴ Among the other demands, President Trump wants to see the asylum system fixed, reduced funding for sanctuary cities, more immigration judges, and an end to the lottery system.³¹⁵ President Trump said that his demands "must be included as part of any legislation addressing' DACA because without changes, 'illegal immigration and chain migration, which severely and unfairly burden American workers and taxpayer, will continue without end.'"³¹⁶ This list is viewed unfavorably among Democrats and even many Republicans.³¹⁷ Thus, Congress will likely continue arguing over immigration, making the future of DACA unknown.

Moreover, President Trump held a meeting to negotiate a bipartisan immigration plan before a government shutdown on January 19, 2018.³¹⁸ However, the measures laid out by some members of Congress were much more expansive and the negotiation reached an impasse.³¹⁹

The stress of the immigration talks worsened when President Trump allegedly said, "[w]hy are we having all these people from

³¹² Seung Min Kim, *Trump Lists Immigration Demands that Could Derail 'Dreamers' Deal*, POLITICO, Oct. 8, 2017, <https://www.politico.com/story/2017/10/08/trump-immigration-plan-dreamers-243586>.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Thomas Kaplan, *House Republicans' Hard-Line Immigration Stand Clashes with Trump Overture*, N.Y. TIMES, Jan. 10, 2018, <https://www.nytimes.com/2018/01/10/us/politics/house-republicans-hard-line-immigration-trump.html>.

³¹⁹ *Id.*

shithole countries come here?”³²⁰ This comment did not go well with lawmakers, the press, or world leaders.³²¹ These events left even more uncertainties about the stability and future of any immigration plans.

DACA’s reinstatement by Judge Alsup is likely to be temporary, as it is only an injunctive relief.³²² The best solution is not a court order, but legislation which will legally bind the country with some sort of reform. However, if Congress fails to act, it is likely that any other court order or court decision will come with many more administrative issues and appeals. The only way to see real change is through a final law, whether through Congress or the Supreme Court.

Although there are many unknowns regarding DACA and immigration policies in general, one thing is certain— Congress should act because too many people are affected, and it should consider all sides when doing so. However, the bottom-line should be the people. DACA affects real people, whether they are citizens or undocumented, and they deserve to have Congress act and speak on their behalf because that is what the members were elected to do.

VI. CONCLUSION

Imagine being targeted and living in constant fear. Imagine being stereotyped and misunderstood. Imagine being criminalized.

³²⁰ John Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST, Jan. 12, 2018, https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.1a6bfad9928.

³²¹ James Griffiths, *Shame on Trump!’ World reacts to Trump’s ‘shithole countries’ remarks*, CNN, Jan. 12, 2018, <https://www.cnn.com/2018/01/12/politics/trump-shithole-countries-reaction-intl/index.html>. Some of the criticism includes: “UN human rights spokesman Rupert Colville [who] condemned Trump’s remarks as ‘shocking and shameful’ and going against the world’s ‘universal values...’I’m sorry, but there’s no other word one can use but racist” The Haitian government said that it was “deeply shocked” and was against the “abhorrent and obnoxious remarks” *Id.* Former Mexican President Vicente Fox, asked “[w]ith what authority do you proclaim who’s welcome in America and who’s not. America’s greatness is built on diversity, or have you forgotten your immigrant background, Donald?” *Id.*

³²² *Regents of the Univ. of Cal. v. Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2018 U.S. Dist. LEXIS 4036, at *1 (N.D. Cal. Jan. 9, 2018).

Imagine being powerless. Imagine being foreign. Imagine being undocumented. This comment has examined some of the very real harsh realities that undocumented individuals face.

The United States is a country with a rich history of immigration. In fact, immigrants who wanted a better life founded the United States. The individuals arriving in the United States are seeking that same opportunity. However, people who are undocumented are being criminalized for lacking a piece a paper. Although coming to the United States without documentation is illegal, the majority of undocumented individuals do not pose a safety risk.³²³ For this reason, there have been numerous amnesty and government programs that allow individuals to remain in the country.³²⁴

DACA has been one of the most controversial and prominent government programs in the present day. President Obama authorized an executive memorandum which allowed undocumented immigrants who arrived in the country as children to be given deferred removal status, work authorization, and social security cards.³²⁵ When President Trump rescinded DACA, he did so because of its alleged unconstitutionality.³²⁶ There is little guidance as to whether DACA is, in fact, unconstitutional.³²⁷ Regardless, the power to act will now either be legislative or judicial.

Unless, and until there is concrete action, DACA recipients and other undocumented immigrants are now facing harsher realities. One of the biggest consequences is an increase in deportation procedures.³²⁸ The government may remove individuals with prosecutorial discretion and stipulated removals.³²⁹ Although individuals facing removal have limited rights, they do have rights.³³⁰

³²³ Christopher Ingraham, *Two Charts Demolish the Notion that Immigrants Here Illegally Commit More Crime*, WASH. POST, June 19, 2018, https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime/?utm_term=.adceeb9ad77b.

³²⁴ See *supra* Section II.

³²⁵ See *supra* Section III.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ See *supra* Section IV.

³²⁹ *Id.*

³³⁰ *Id.*

The government needs a reminder of these rights when officials choose to abuse their power at the expense of immigrants who face harsh and unfamiliar systems.

Understanding the immigration system, its history, and its many facets is crucial to understand the political and social scheme of the United States. Immigration policies, especially those regarding undocumented immigrants, impact millions. One cannot simply analyze the debate one-sidedly because there is so much more that actually goes into making a decision such as the one President Obama made in enacting DACA, the one President Trump made in rescinding DACA, what the DHS goes through in its removal procedures, and what Congress and the courts alike need to consider when making a decision regarding the fate of immigration policies.

Lately, DREAMers have created a social movement. Immigration reform is at the center of most political debates. Politicians have long pushed back in addressing immigration policies, especially policies that deal with young undocumented immigrants. However, the time to act is now; the people are waiting for their leaders. Many individual's livelihood and their chance at pursuing the American Dream depend on it.